

THE FOUNDATIONS OF MILITANT DEMOCRACY

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1. INTRODUCTION: DEMOCRACY IN TURBULENT TIMES

In the year 2011 we have seen some radical changes in the Middle East: in successively Tunisia, Egypt and Libya the ruling autocrats had to clear the field, and in other Arab countries the future of autocratic leaders has become much less certain. The initial euphoria has now given way to a more sober assessment of the situation. Especially in Egypt and Tunisia Islamist parties proved to be very successful in the recent elections.² Apparently the crumbling down of autocracies does not necessarily lead to the creation of liberal-democratic and secular states. The question is: to what extent is democracy likely to flourish in these states? Will these fragile democratic states be able to shed their autocratic past or will they relapse into authoritarianism? And what does that tell us about the concept of 'democracy'? Is democracy simply majority rule? And what is to be done when regimes are inaugurated by democratic means, and their intentions seem far from democratic?

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² See: Barrada, Hamid, 'Les 'barbus' au pied du mur', in: *La Revue*, 'Les Islamistes à l'épreuve du pouvoir', No. 18, Décembre 2011, p. 50-52.

Few historical events are absolutely unique in the sense that they occur only once. History presents us with a plethora of examples from which we can learn, and more importantly, *should learn*, because, as Santayana teaches us: 'Those who cannot remember the past are condemned to repeat it'.³

This contribution is dedicated to the question how democracy can protect itself against its own decay. There are historical parallels that may prove to be instructive and there are prominent authors who struggled to come to grips with these phenomena. This is where the concept of 'militant democracy' comes to the fore.

The roots of the concept of 'militant democracy' can be traced back to the German émigré scholar Karl Loewenstein (1891-1973). When he published his now well-known article on the concept of militant democracy (in 1937)⁴ he had just settled down in the United States. After teaching at Yale University he accepted a lectureship at Amherst College and was about to become an American citizen in 1939.⁵ Loewenstein left for the U.S. when he realised that, in the new political climate that resulted from the Nazi ascendancy to power in 1933, his Jewish ancestry and liberal mind-set would not – to say the least – be in his favour.⁶ It is evidently this *specific* context in which

³ See: Santayana, George, *Reason in Common Sense*, Volume One of 'The Life of Reason', New York: Dover Publications 1980 (1905), p. 284.

⁴ The article was published in two parts, see: Loewenstein, Karl, 'Militant Democracy and Fundamental Rights, I', *The American Political Science Review* 1937, vol. 31 no. 3, p. 417-432 (hereafter: Loewenstein 1937a) and Loewenstein, Karl, 'Militant Democracy and Fundamental Rights, II', *The American Political Science Review* 1937, vol. 31 no. 4, p. 638-658 (hereafter: Loewenstein 1937b). Both parts are reprinted in: Sajó, Andras (ed.), *Militant Democracy*, Utrecht: Eleven International Publishing, 2004, p. 231-262. Certain parts of the discussion involving militant democracy can, in fact, be found much earlier. For example Plato's criticism of democracy may be interpreted as the 'paradox of democracy': the possibility that a majority may decide that a tyrant should rule. See on this: Popper, Karl, *The Open Society and Its Enemies*, London: Routledge 1995, p. 602 (note 4 to chapter 7 of volume I).

⁵ See: Kostal, R.W., 'The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945-1946', *Law and History Review* 2011, vol. 29 no. 1, p. 3

⁶ Kostal puts it this way: 'When the Nazis came to power in 1933, Loewen-

stein's 1930's writings have to be understood. In a 1935 article he describes how all over Europe democracy is involved in an existential confrontation with its – more aggressive – counterpart: autocracy.⁷ To Loewenstein the prospects of this confrontation looked grim. His 1937 article can be read as a proposed answer to the problems that he diagnosed earlier, in short: democracy – just as its counterpart – has to become *militant*; thus the term was coined, and the concept was born.

However, at the same time – in between the two articles published by Loewenstein – the Dutch constitutional theorist George van den Bergh (1890-1966) addressed the very same problem in his inaugural lecture as professor of constitutional law at the University of Amsterdam. In this lecture – entitled: 'The democratic State and the non-democratic parties'⁸ – Van den Bergh defended the thesis that a democratic state *de iure constituto* does not have to, and *de iure constituendo* should not be willing to, tolerate non-democratic parties.⁹ Although Van den Bergh shared the same diagnosis of the situation, the theoretical foundation of his solution differs notably from Loewenstein's.

In the extensive literature on the concept of 'militant democracy' reference is often made to Loewenstein as the 'father of the concept'.¹⁰ However, attention is hardly ever paid to what

stein's Jewish ancestry, liberal cast of mind, and fine English were three compelling reasons for him to leave Munich for a lectureship at Yale University.' See Kostal 2011, p. 3.

⁷ Also published in two parts: Loewenstein, Karl, 'Autocracy versus Democracy in Contemporary Europe, I', *The American Political Science Review* 1935, vol. 29 no. 4, p. 571-593 (hereafter: Loewenstein 1935a) and Loewenstein, Karl, 'Autocracy versus Democracy in Contemporary Europe, II', *The American Political Science Review* 1935, vol. 29 no. 5, p. 755-784 (hereafter: Loewenstein 1935b).

⁸ Van den Bergh, George, *De democratische Staat en de niet-democratische partijen* (in English: *The democratic State and the non-democratic parties*), Amsterdam: De Arbeiderspers 1936.

⁹ 'De iure constituto' and 'de iure constituendo' being the Latin phrases for respectively 'established law' and 'law as it should be'.

¹⁰ For a comprehensive overview of the (international) literature on the concept, see: Thiel, Markus, 'Introduction', in: *The 'Militant Democracy' Princi-*

Loewenstein *himself* had to say about his brainchild.¹¹ This contribution therefore has a twofold purpose: it attempts to fill this gap, while at the same time it is trying to shed some light on a number of fundamental questions regarding the concept of 'militant democracy'. We will start by discussing at length Loewenstein's outline of the concept (§2), after which the questions Loewenstein leaves open will be dealt with in the third section, where Van den Bergh's approach to the same problem is reviewed (§3). After a brief recapitulation (§4), three concepts of militant democracy will be discerned and in doing so, some other theoretical problems concerning 'militant democracy' will be discussed (§5).

2. LOEWENSTEIN: MILITANT DEMOCRACY

2.1 Loewenstein's diagnosis: democracy on the defensive

In 1935 Loewenstein published an article in two parts, in which he expresses his deep concerns about the future of democracy in Europe.¹² Loewenstein expresses the fear that democracy will eventually fall prey to autocracy: they are immersed in an *existential* battle, and democracy seems to be the weaker side. The article nevertheless ends on a positive note by claiming that not all hope is yet lost. When democracy becomes 'militant', it can resist the autocratic threat. In the following, Loewenstein's analysis will be discussed.

The nature of the autocratic threat

Autocracies, according to Loewenstein, are characterized by the absence of the separation of powers and a lack of mutual con-

ple in *Modern Democracies*, Thiel, Markus (ed.), Farnham: Ashgate 2009, 11-13.

¹¹ The somewhat inaccessible nature of some of his articles – due to the intermingling of factual accounts, legal analysis and theoretical-philosophical observations – could very well account for this.

¹² The above-mentioned: Loewenstein, Karl, 'Autocracy versus Democracy in Contemporary Europe, I' and Loewenstein, Karl, 'Autocracy versus Democracy in Contemporary Europe, II'.

trol within the administration. Power is concentrated in the hands of a person or group of persons who – uncontrolled by a free public opinion – can exercise an absolute power over the executive, legislative, and often also the judicial branch.¹³ 'Autocracy' in Loewenstein's use is therefore a broad category, which roughly corresponds to what we would call an absolutist system. Under autocracy Loewenstein brings for example both German and Italian fascism, but also Soviet communism. Loewenstein stresses that such autocratic regimes are not new. Autocracy is historically by far the dominant form of government.¹⁴ Democracy as we know it has become a strong competitor only since the second half of the nineteenth century.¹⁵ So the rise of autocracies is at best a relapse into an old European 'habit'. When Loewenstein proceeds by categorizing the various European states along the lines of the democracy-autocracy distinction, he can only conclude that Europe is forced in the defensive. Where once the universal acceptance of democracy seemed inevitable, an autocratic victory now seems almost as likely.¹⁶

Loewenstein devotes the rest of his extensive discussion to a prognosis of the survival of democracy. He does this in a very thorough fashion: he wants to get to the *nature* of the autocratic threat. In Europe this autocratic threat largely stems from the rise of *fascism*. Loewenstein sees fascism as a universal political *technique*, which – when carefully applied – leads to the establishment of an autocratic regime, although the rate at which this process is run through can vary, depending on national circumstances.¹⁷

¹³ Loewenstein 1935a, p. 571-572.

¹⁴ See on this: Tullock, Gordon, 'Autocracy', in: *The Encyclopaedia of Public Choice*, Rowley, Charles K. and Schneider, Friedrich (eds.), New York: Kluwer 2004, p. 356-358.

¹⁵ Loewenstein 1935a, p. 572-573.

¹⁶ Loewenstein 1935a, p. 574. As 'still democratic states' Loewenstein mentions: Great Britain, The Irish Free State, France, Belgium, The Netherlands, Sweden, Norway, Denmark, Finland, Switzerland and Czechoslovakia. Prone to autocracy are Spain and Greece. See p. 571.

¹⁷ Loewenstein 1935a, p. 584.

Fascism as a political technique

The universal fascist method consists of several distinct phases. Firstly, they often find their origin in, and are nourished by, economic crises. The deep global economic depression of the 1930s made calls for government intervention grow louder in both Europe and the United States. Economic self-government via the market had to make way for regulation by the government. This regulation would include limited economic planning in order to restore confidence in the economy but also more radical forms like the American New Deal.¹⁸ Crucial in all this is the need for a *centralized* organization to coordinate the large-scale intervention by the government. The benefits of such a centralized organization are no longer questioned at this point – the government simply *has* to act – and thus the ideal springboard for fascists is created. It is therefore no coincidence that the Nazis looked with particular interest to President Roosevelt's New Deal. In a 1933 interview we can see propaganda minister Goebbels extensively praising Roosevelt's approach. He compliments the president with his plans and stresses that tackling economic problems cannot be left to private initiative; it is the *government* who should address these problems.¹⁹

A logical consequence of all this, so Loewenstein continues, is the implementation of a 'centralized planning authority': the need for a strong government is felt. The practice of seeking compromises – one of the essential qualities of democracy –, is now turned into an obstacle, making forceful action impossible. Clamping down political parties and free public opinion seems a necessary condition for being able to carry out an effective economic planning: the 'political irrationality' should be destroyed so that a rational planning towards recovery can be made.²⁰ Loewenstein does not say it in so many words, but the presumed lack of decisiveness in democracies obviously makes

¹⁸ Loewenstein 1935a, p. 577.

¹⁹ The interview can be seen in a documentary by BBC: BBC Four, 'The Century of Self, One: Happiness Machines', 2002.

²⁰ Loewenstein 1935a, p. 578-579.

it easy to discredit it in times of crisis. Compromise is no longer perceived as democracy's power, but turns into its grave weakness. However, this is not all. Loewenstein explicitly points to another weakness of democracy. Where democracy on the one hand suffers from its indecisiveness, it also gives hostile parties ample opportunity to openly preach its destruction on these grounds. The generous and lenient Weimar Republic offered 'Hitlerism' – as Loewenstein calls it – the perfect opportunity to use democracy with the *express* purpose of abolishing it. The anti-parliamentary groups joined the legislative bodies with the unreserved intention of causing the parliamentary system to breakdown.²¹ In this way 'democracy sharpened the dagger by which it had been stabbed in the back.'²²

In the last stage of the fascist technique the *opportunities* offered by democracy are used to make the final steps towards the coup d'état.²³ A nationwide organization is set up, with local chapters under a strict central management. Small political turmoil is stirred until national attention turns to the issue, after which the necessary propaganda is deployed to discredit the existing political system. A great program is announced which makes – often contradictory – promises to various groups. Mass events are organized to feed discontent and stir agitation. Uniforms and military insignia appear in the streets. The state has now become a seething mass of discontent and ready for rebellion and civil war, when, from the depths of the masses, the strong man stands up to save the state from the trembling hands of democracy.²⁴ How subsequently the 'final blow' is adminis-

²¹ Loewenstein 1935a, p. 580.

²² Loewenstein 1935a, p. 580.

²³ Loewenstein 1935a, p. 581.

²⁴ Loewenstein also makes the interesting observation that the leadership principle is in fact, a kind of 'democracy' *in extremis*. It has great appeal to the public, because it seems like literally *everyone* is able to seize power: no political, successful civil career or careful selection is required. The strong man just suddenly rises from the depths of the masses. See Loewenstein 1935a, p. 582.

tered and the power is actually seized depends on the temperament of the leader and the actual political situation.²⁵

National circumstances

To what extent the fascist technique succeeds can vary, depending on national circumstances.²⁶ National economic crisis and disillusionment seem to be the main factors that accelerate the rise of fascism. We already saw how fascism can use economic crises as a springboard. According to Loewenstein some see the educational level in a particular state as a countering *inhibitory* factor. States with an educated population would be less likely to fall prey to fascism. Loewenstein rightly disputes this view. Although in a number of autocratic states illiteracy was indeed considerable – such as Italy, Spain and Turkey – this could hardly be said of Germany and Austria; two countries that may well have had some of the best educated populations at that time. A much better guarantee against the dismantling of the democratic system seems to consist in a sufficiently established tradition of self-government. In none of the autocratic states democracy held long enough to wipe out the memory of autocratic government. The population did not have the chance to learn to appreciate the advantages of a democratic government.²⁷ On the other hand; in all the states where a long and sustained tradition of democratic self-government is found, democracy still exists. We are therefore safe to conclude, Loewenstein continues, that the existence of a democratic tradition in a specific state functions as quite an accurate predictor for the survival of democracy in that state.²⁸

²⁵ Loewenstein 1935a, p. 583. For a comprehensive overview of the events that led to the dissolution of democracy in the case of the Nazi's, see: Jacobsen & Schlink, 'Introduction', in: *Weimar: A Jurisprudence of Crisis*, Jacobsen, Arthur J. & Schlink, Bernhard (eds.), Berkeley: University of California Press 2000, p. 8-14.

²⁶ Loewenstein 1935a, 584-588.

²⁷ Loewenstein 1935a, p. 587. Loewenstein points to Germany, Austria-Hungary and Italy.

²⁸ Loewenstein 1935a, p. 588. In the remainder of the article (the second part) Loewenstein examines how democratic the future of different states promises

Preliminary conclusions

When we analyze Loewenstein's 1935 diagnosis we can conclude the following. Without himself stating it explicitly, it follows from Loewenstein's analysis that democracy is vulnerable in *three* ways. First, it is vulnerable due to its inherent structure: democracy is governed by compromise. Under normal conditions, this is an agreeable and civilized aspect of our self-government. In times of (economic) crisis, however, this search for compromise turns into indecision and inertia. This flaw is then easily exploited to discredit democracy.

Second, democracy offers constitutional freedoms to its most hostile opponents, thereby allowing them to *actually* discredit and vilify her. The dissemination of antidemocratic propaganda is protected by the freedom of speech, where the freedom of assembly grants antidemocratic parties the freedom to organize themselves around their antidemocratic aims. And, third, democracy even allows those hostile parties to access – after the election – the very institutions that they have preached to destroy.

The universal technique of fascism seems perfectly suited to these three weaknesses. Fascism is parasitic on democracy's tolerance. When the fascist technique is applied correctly and carefully, the establishment of an autocratic regime seems inevitable. National conditions can accelerate this process, like a deep economic crisis, or delay it, when a democratic tradition is present, but the outcome is *ultimately* inevitable when the fascist technique is released with sufficient precision in a 'pacifist' democracy. Therefore the autocratic threat can only be met when the 'soft spots' in democracy are fortified. Democracy needs to abandon its passive, apathetic attitude and has to undertake action against parties that threaten its survival. Democracy should no longer be pacifist; it should become *militant*.²⁹

to be. This part will not be further discussed here. See: Loewenstein 1935b, p. 755-784.

²⁹ Loewenstein 1935a, p. 580.

'Democracy cannot be blamed if it learns from its ruthless enemy,' says Loewenstein.³⁰

2.2 Loewenstein's solution: militant democracy

The solution Loewenstein anticipates in his 1935 article is worked out in more detail two years later in an article called 'Militant Democracy and Fundamental Rights, I & II'.

Fascism by the grace of democracy

According to Loewenstein, fascism in 1937 was a worldwide movement.³¹ This sense of urgency is reflected in his choice of words, where in 1935 he was somewhat moderate, he now warns of a 'Union of Europe's Regenerated Nations' and a 'fascist International of the multi-colored shirts.'³² He now even more explicitly than before links fascism to democracy: the success of fascism is based on its perfect adaptation to democracy.³³ Fascism is nothing more than a political technique that exploits the weaknesses of democracy. It is no coherent philosophy or ideology: fascism simply wants to rule.³⁴ The then new Spanish autocrat General Franco is exemplary for Loewenstein in this respect. Franco did not even have the slightest pretext of a substantiated program.³⁵ Fascism will only *seemingly* have content by opposing certain aspects that it attributes to democracy. Leadership is contrasted with 'parliamentary corruption'; 'order' is contrasted with 'democratic chaos'. The politics of emotionalism are at the core of the fascist technique. The mass is played without noticing that it is being played. In

³⁰ Loewenstein 1935a, p. 593.

³¹ Loewenstein 1937a, p. 417.

³² Loewenstein 1937a, p. 418.

³³ Loewenstein 1937a, p. 423.

³⁴ One can question this rather blunt assertion by Loewenstein, since for example the Italian Fascism seemed fairly concerned with ideology, see on this: Mosse, George, *The Culture of Western Europe*, Boulder: Westview Press 1988, 343-357. Loewenstein, however, does see 'Nazism' as a political philosophy. See: Loewenstein, Karl, 'Legislation for the Defense of the State in Chili', *Columbia Law Review* 1944, vol. 44 no. 3, p. 407.

³⁵ Loewenstein 1937a, p. 423.

this way, says Loewenstein, fascism is the true child of the modern age of technological wonders and emotional masses.³⁶

Common front of democracies

The internal pacifism of democracy seems to express itself externally: democracies adhere to the idea that a 'war of ideas' should be avoided.³⁷ Loewenstein criticizes this idea; it exemplifies the lack of coordination among democratic states. A first step towards democracy's resistance to autocracy³⁸ would be greater international cooperation among democratic states: they should form a common front. In each country where fascism seized power, this was made easier by the lack of unity on the side of its (international) opponents.³⁹ The actuality of Loewenstein's plea is still evident when we read Robert Kagan's recent plea for a 'concert of democracies'. In *The Return of History and the End of Dreams* (2008), he categorizes the world along lines of democracy and autocracy as well.⁴⁰ The democracies of the world need to find a way to secure their basic principles, now that they *again* face a serious challenge in the recurrence of autocratic powers. Kagan sees the 'concert of democracies' as a way to meet this challenge: democratic states need to close ranks and, amongst other things, offer support to democracy in states where democracy is at stake.⁴¹ In Kagan's view 'the democratic world should continue to promote political liberalization; support human rights, including empowerment of women; and use its influence to support a free press and repeated elec-

³⁶ Loewenstein 1937a, p. 423. Loewenstein suggests something similar in his 1935 article when he says that 'modern technique has rationalized the most irrational feature of government-dynamics, the *coup d'état*'. See: Loewenstein 1935a, p. 583.

³⁷ Loewenstein 1937a, p. 428-430.

³⁸ Loewenstein uses the terms autocracy, fascism and authoritarianism for the same type of government, namely one in which the separation of powers and a system of checks and balances is missing. See above: Section 2.1, 'The nature of the autocratic threat'.

³⁹ Loewenstein 1937a, p. 428-430.

⁴⁰ Kagan, Robert, *The Return of History and the End of Dreams*, New York: Vintage Books, A Division of Random House 2009.

⁴¹ Kagan 2009, p. 101.

tions that will, if nothing else, continually shift power from the few to the many.⁴²

Militant democracy

However, it is not the proposed partnership of democratic states that is the most needed. The most important measures to be undertaken are internal, in the states themselves. Where Loewenstein first uncovered the weaknesses of democracy, then described how fascism parasitizes, or better yet, how it can only exist solely by virtue of democracy, he now finally comes to speak about the solution that he already proposed earlier, namely: militant democracy. It was already made clear that the weak spots of democracy need to be covered, but how this could be justified *theoretically* still remains to be seen. Or, as Loewenstein puts it: 'Democracy stands for fundamental rights, for fair play for all opinions, for free speech, assembly, press. How could it address itself to curtailing these without destroying the very basis of its existence and justification?'⁴³

Precisely on this fundamental point, his answers are rather unsatisfactory. First we are told that many countries already seem to be on the right way: they have let go of the 'democratic fundamentalism' they used to adhere to. One by one, the weak spots of democracy are covered by legislation so that fascism is left powerless. This will, however, not bring us any further on the *theoretical* issue. As so often with Loewenstein, the empirical and comparative dominate.⁴⁴ Nevertheless, Loewenstein tries to find some kind of theoretical justification in an analogy

⁴² Kagan 2009, p. 102.

⁴³ Loewenstein 1937a, p. 431.

⁴⁴ Much of Loewenstein's work consists of comparative studies of political institutions and legislation. Besides the articles discussed here, relevant examples, among others, are: Loewenstein, Karl, 'The demise of the French Constitution of 1875', *The American Political Science Review* 1940, vol. 34 no. 5, p. 867-895; Loewenstein, Karl, 'The Presidency Outside the United States: A Study in Comparative Political Institutions', *The Journal of Politics* 1949, vol. 11 no. 3, p. 447-496; Loewenstein, Karl, 'The Union of Western Europe: illusions and reality, I. An appraisal of the methods', *Columbia Law Review* 1952, vol. 52 no. 1, p. 55-99.

with the state of emergency in times of external war. In times of siege, it is generally accepted that constitutional principles are suspended. In its struggle against anti-democratic forces, democracy however does not fight an external but an internal war. Loewenstein now states that just as in an external war, we cannot let constitutional guarantees form an obstacle in the internal fight to *preserve* these constitutional guarantees for the future: 'constitutions are dynamic to the extent that they allow for peaceful change by regular methods, but they have to be stiffened and hardened when confronted by movements intent upon their destruction.'⁴⁵

This 'analogy' does, however, not actually bring us any further, since the situation of an external war is in fact quite different from that of an internal war. In external war it is undoubtedly legitimate for a democracy to defend itself: democracy *as a totality* confronts an externality, the hostile state. In internal war democracy's enemy is not external but an intrinsic part of itself. Especially when this part consists of a political party that legitimately participates in democratic proceedings, it is not immediately clear why in that case - if we want to stay true to our core democratic principles - the suspension of constitutional guarantees is justified. It is evident that action in these cases is desirable, but how such action is theoretically compatible with the fundamental principles of democracy remains unclear. It is a significant point Loewenstein leaves open here.⁴⁶

Preliminary conclusions

After his 1935 diagnosis, we see a passionate Loewenstein in 1937 advocating more resilience among, and within, democracies. They need to cooperate more, but above all strengthen themselves internally: law must fortify the soft spots in the democratic structure. Fascism is a parasitic technique that, when

⁴⁵ Loewenstein 1937a, p. 432.

⁴⁶ Loewenstein also addresses the extent to which ideas can be suppressed. His answer is quite straightforward: they cannot be suppressed. But since fascism is not an ideology or 'idea' but only a political technique this is not an issue here. See: Loewenstein 1937a, 431-432.

given the chance, will exploit these weaknesses to seize power. Democratic fundamentalism should therefore be abandoned: democracy must become militant. Loewenstein thereby became the father of the concept of militant democracy, and he deserves credit for that. When the argument reaches its climax, however, and the fundamental question of the theoretical justification is posed, Loewenstein's answers are fairly disappointing. The concept of militant democracy thus received a somewhat unhandy father, one which – in the heat of the battle – could very well see wherein the threat existed and proposed a realistic remedy against this threat, but whose ultimate *theoretical* justification for that solution was gravely unsatisfactory.⁴⁷

3. VAN DEN BERGH: DEMOCRACY AS SELF-CORRECTION

In 1938 Loewenstein published another article, in which he meticulously analyzes exactly what kind of legal action the European countries have taken against political extremists.⁴⁸ In a footnote to his discussion of the situation in the Netherlands he points to the Dutch constitutional theorist Van den Bergh and his inaugural lecture 'The democratic State and the non-democratic parties'. Loewenstein notes that – to his knowledge – Van den Bergh's piece is the only European contribution to the problem of militant democracy, which arrives at similar conclusions as his own 1937 article.⁴⁹ Loewenstein compliments Van den Bergh with his 'competent review' of the *legal* aspects of the exclusion of non-democratic parties. But if one reads Van den Bergh's text, one cannot help feeling that Loewenstein

⁴⁷ Loewenstein continues his discussion with a vast account of the measures undertaken in different European countries. These will not be discussed here. See: Loewenstein 1937b, p. 638-658.

⁴⁸ Loewenstein, Karl, 'Legislative Control of Political Extremism in European Democracies I', *Columbia Law Review* 1938, vol. 38 no. 4, p. 591-622 (hereafter: Loewenstein 1938a) and Loewenstein, Karl, 'Legislative Control of Political Extremism in European Democracies II', *Columbia Law Review* 1938, vol. 38 no. 5, p. 725-774 (hereafter: Loewenstein 1938b).

⁴⁹ Loewenstein 1938a, p. 617. In that specific footnote Loewenstein refers back to footnote 14 in quoting his own work; we may assume that he means footnote 13, since his 1937 article is quoted in footnote 13 and not 14.

missed an important part of the portée of Van den Bergh's inaugural lecture. Van den Bergh indeed discusses the legal possibilities of actually forbidding political parties, but more importantly, he devotes considerable attention to the *theoretical* justification of such measures. In other words, exactly the point that Loewenstein left fairly untouched in his own articles. In the following we will discuss Van den Bergh's approach to this theoretical problem.

3.1 The issue put into focus

After a brief digression about the distinction between democracies and dictatorial states – dictatorial states are *non-democratic* states, where no self-government exists⁵⁰ – Van den Bergh states that for a fruitful discussion of the matter a few things need to be clarified. A lot has been written in the Netherlands and abroad, so Van den Bergh continues, on a question which is in fact not that interesting, namely: the question whether a democratic state may defend itself against violent parties that seek its abolition. The answer to this question is surely evident: 'political parties and individuals who decry, or by their attitude show, that they want to fight the existing law by illegal means, or, to fight it once they please, cannot expect otherwise than to be considered enemies by the State and to be treated accordingly.'⁵¹

The *interesting* question arises, however, when parties want to end democracy solely by lawful means, *i.e.* when parties participate in elections to obtain a majority in parliament, and then by changing the law and constitution turn the democratic state into a non-democratic one.⁵² Loewenstein does not seem to see

⁵⁰ Van den Bergh notes that this definition is in line with popular parlance, although in political science, the term dictatorship is used for the *temporary* transfer of power to one person. See: Van den Bergh 1936, p. 4. The 'popular' definition of dictatorship Van den Bergh uses roughly corresponds to what Loewenstein means by 'autocratic'.

⁵¹ Van den Bergh 1936, p. 5. All translations, unless otherwise indicated, are by the authors.

⁵² Van den Bergh 1936, p. 6.

this vital distinction either. In his article of 1937 he does not define exactly against what *kind* of anti-democratic parties the concept of militant democracy attempts to protect democracy: is it only against hostile but violent parties, or also against hostile but non-violent parties? Nevertheless he seems to focus on violent parties, since he does discuss the creation of party militias and other semi-military groups that entail at least the possibility of actual violence.⁵³ His study of anti-extremist legislation in 1938, however, opens with the explicit statement that by 'subversive activities' are meant: 'all overt or covert acts of persons who advocate or practice doctrines which aim to overthrow the existing political order under the implied or admitted presupposition that to achieve their end, violence may be utilized. Mere non-conformity with the fundamental principles of government and political philosophy embodied in the constitution will *not* (emphasis added, PC & BR) be considered as making a political movement subversive if conversion of the majority of the people to its tenets is to be attained solely by submitting the desired political change to the ballot through the medium of lawful propaganda within the existing laws.'

Precisely when parties *reject* violence and adhere to only lawful means, the real issue is in focus and the arguments of the 'democratic fundamentalist' are at its strongest. Because, is it not true, Van den Bergh asks, that all parties - if they have a sufficient majority - would want to make fundamental changes in the constitution?⁵⁴ Are these parties, who attempt the abolition of democracy solely by legal means, not also fully entitled to participate in the democratic process, since we claim to be a *democratic* state? It is *this* issue that Van den Bergh attempts to answer on both the positive law and theoretical-philosophical side of the question. Here we will focus on the theoretical part of his argument.⁵⁵

⁵³ See: Loewenstein 1937a, p. 424-425.

⁵⁴ Van den Bergh 1936, p. 7.

⁵⁵ Concerning the legal aspects, he concludes that, based on a somewhat outdated law from 1855, it is indeed possible to prohibit non-democratic parties under Dutch Law, on the grounds that they are a threat to public order. See

3.2 A theoretical justification for militant democracy

In a democracy everyone has the right to try to win the people for his beliefs and ideals. This even seems to be the true *essence* of democracy: it treats all values as equal; it is value-neutral. It is the peaceful struggle of minds that has to decide between those values.⁵⁶ Although Van den Bergh does not mention him, this is clearly the view of the famous Austrian jurist and philosopher Hans Kelsen in his 1929 article 'Vom Wesen und Wert der Demokratie': democracy equally values and respects each political belief.⁵⁷ In a later article called 'Verteidigung der Demokratie' Kelsen asserts even more forcefully that a democracy which tries to defend itself against parties that want to abolish it, ceases to be a democracy.⁵⁸

Van den Bergh acknowledges that he also had been devoted to this view, but, so he says, after much contemplation, he came to the conclusion that it ultimately does *not* hold.⁵⁹ Besides the previously mentioned 'equality of ideas', one of the main characteristics of democracy is its *self-correcting* capacity.⁶⁰ In a democracy the circles of 'decision-makers' and 'stakeholders' – ultimately – are one.⁶¹ The people feel the impact of its deci-

also: Van Poelje, G.A., 'Bewogen Staatsrecht', in: *Opstellen aangeboden aan Prof. Mr. Van den Bergh ter gelegenheid van zijn aftreden als hoogleraar in het Nederlandse Staatsrecht aan de Universiteit van Amsterdam*, Alphen aan den Rijn: N. Samson 1960, p. 3.

⁵⁶ Van den Bergh 1936, p. 8.

⁵⁷ See Kelsen, Hans, On the Essence and Value of Democracy ('Vom Wesen und Wert of Democracy'), in: Jacobson and Schlink 2000, p. 84-109. In this article Kelsen even explicitly links democracy to a relativistic worldview, see p. 106-109. On Kelsen's theory of democracy in general, see: Dreier, Horst, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, Baden-Baden: Nomos Verlagsgesellschaft 1990, p. 249-294.

⁵⁸ See Kelsen, Hans, 'Verteidigung der Demokratie', in: *Verteidigung der Demokratie: Abhandlungen zur Demokratietheorie*, Tübingen: Mohr Siebeck 2006 (1932), p. 237.

⁵⁹ Van den Bergh 1936, p. 9.

⁶⁰ Van den Bergh 1936, p. 9.

⁶¹ Van den Bergh 1936, p. 9. The resemblance with Schmitt's 'identity of the rulers and the ruled' ('Herrscher und Beherrschten') is striking, see: Schmitt, Carl, *Verfassungslehre*, Munich and Leipzig: Duncker & Humblot 1928, p.

sions, and because they are its *own* decisions, it can – in principle – revoke them again. The democratic self-government is, in this way, nothing more than a state of ‘permanent self-correction’. If we oversee the wide spectrum of possible views and ideas in a democracy, it comes to our notice that one belief in this respect is distinct from the others, namely the belief that democracy should be abolished.⁶² This latter belief, when carried out, constitutes an *irreversible* fact. This brings this belief into conflict with the ‘self-correcting nature’ of democracy and thus threatens the essence of democracy. Van den Bergh does not say it in such strong words, but based on these considerations, we could say that the essence of democracy does not lie *merely* in its value-neutrality, but *also* in its self-correcting ability. Seeing democracy as the combination of both makes it now theoretically justifiable to give all but one belief an equal treatment, the one belief being the idea that democracy should be abolished. Van den Bergh thus hands us a conception of democracy that makes the desirable – the prohibition of anti-democratic parties – theoretically justifiable.⁶³

4. A BRIEF RECAPITULATION AND TRANSITION TO THE FOLLOWING

It is to Loewenstein’s credit that he identified the weaknesses of democracy and so clearly and accurately described how a new phenomenon at that time – fascism – exploits these weaknesses. The origins of militant democracy – as we have seen – are

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⁶² Van den Bergh 1936, p. 9.

⁶³ Van den Bergh himself appears not to be entirely aware of the elegance of his thesis when later on in his article he argues for a ‘value-laden democracy’ by stating that parties must at least accept certain ‘inviolable moral and legal principles’ before they can be allowed access to the democratic process. First parties have to agree to *have* a discussion at all, based on certain principles, or in as in the French saying: ‘Pour discuter il faut être d’accord’. See: Van den Bergh 1936, p. 24–28. Several years later Karl Popper took a similar stance when he declared that one should be intolerant against intolerance, when the intolerant denounce all argument. See: Popper 1995, p. 602 (note 4 to chapter 7 of volume I).

therefore strongly situated in the struggle against fascism. A ‘militant democracy’ is seen as a democracy that fortifies its weaknesses against the ruthless political technique of fascism.

Two theoretical issues Loewenstein more or less leaves behind are, however, discussed by Van den Bergh. First, Van den Bergh argues for a clear distinction between the question whether a democracy is entitled to take action against *violent* anti-democratic groups (answer: obviously ‘yes’) and the question whether a democracy can defend itself against *non-violent* anti-democratic groups. This puts the issue more into focus. Van den Bergh’s own answer lies in the self-correcting nature of democracy. This character implies that all but one idea has to be treated equally by democracy, namely the idea that democracy should be abolished. Against such groups democracy may rightfully act.

Thus, the concept of ‘militant democracy’ is actually given two fathers. On the one hand, there is Loewenstein, who after a precise analysis of the weaknesses of democracy, motivated by urgency and without too much theoretical scruples, proclaimed in 1935 that democracy should become more resilient and later elaborates this point in more detail in his 1937 article. On the other hand there is the more theoretically inclined Van den Bergh, who in 1936 provided the first theoretical foundation for ‘militant democracy’, without actually using the term.⁶⁴

Loewenstein and Van den Bergh have thus laid the groundwork for a concept that has become the starting point for, or a core principle in, the constitutional systems of several modern states.⁶⁵ Obviously they could at that time not foresee all theoretical issues related to the concept of militant democracy.

⁶⁴ It appears to be a safe assumption that Loewenstein and Van den Bergh at least until 1938 did not know each other’s work. Van den Bergh says that he, despite ‘diligent searching in Dutch and foreign literature’, failed to find ‘anything of any importance.’ Loewenstein does not cite Van den Bergh’s inaugural lecture in his 1937 article and only refers to it in his comparative study in 1938. This under the indication that Van den Bergh reached ‘similar conclusions’ as he himself reached in his 1937 article, thereby suggesting that Van den Bergh’s text was not available to him in 1937.

⁶⁵ See the above-mentioned impressive survey edited by Thiel: Thiel 2009.

Therefore, in the following part of this contribution we will focus on a few of the theoretical issues to which militant democracy gives rise.

5. THE CONCEPT OF A MILITANT DEMOCRACY

First of all we have to acknowledge that the whole concept of 'militant democracy' is rather vague. Already in the discussion of the ideas of Van den Bergh and Loewenstein we see they give very different interpretations of it. This difficulty only increases when we take more authors in the focus of our attention (Kelsen, Schmitt, to name only a few, some of them treated in the contribution of Ellian to this volume). We hope to bring some clarification to this issue by distinguishing *three* concepts of militant democracy. There is, first, the idea that democracy is an ideal with universal significance. Second, there is the contention that democracy may not be abolished by democratic means. Third, there is the idea that certain civil rights and liberties are essential to democracy and that they may not be violated without invalidating the democratic ideal as such. These three conceptions of 'militant democracy' are related and intertwined but for the sake of clarity they should also be distinguished. We will show that each concept of militant democracy has a prominent porte-parole. The first concept is defended by Robert Kagan, the second by George van den Bergh, the third by Karl Loewenstein.

5.1 *The first concept of militant democracy: democracy as an ideal with universal significance*

In the previous paragraphs we cited Robert Kagan's *The Return of History and the End of Dreams* (2008).⁶⁶ The title of this book makes an allusion to Fukuyama's influential essay *The End of History* (1989). This 'end' would have taken place when in 1989 the Berlin Wall fell, and all autocratic regimes had to

⁶⁶ Kagan 2009.

make place for liberal democracies.⁶⁷ Kagan contends that the idea of an ideological 'end of history' was based on a set of historical circumstances that proved fleeting. Although communism passed from the scene, challengers to democracy did not. Here he refers to China and Russia, two autocratic regimes, not simply as a matter of fact, but also because the leaders of those countries, backed by a substantial part of the population, believe that autocracy is a superior form of government to democracy. Russia is now a kind of 'czarist' political system. The most important political decisions are taken by one man: Vladimir Putin. Putin and his powerful coterie pay lip service to 'democracy' but they give the concept a totally different meaning from what is understood by it in the West. The Russian regime is only 'democratic' in the sense that the Russian people are consulted, but the people have no rights against the government. The legal system is used as a tool against political opponents. The world waits for change, Kagan writes, but in the meantime two of the world's largest nations, China and Russia, have governments committed to autocratic rule. And what is most important: this is not likely to change in the immediate future.

The power and durability of these autocracies will shape the international system in profound ways. The world is not about to embark on a new ideological struggle of the kind that dominated the Cold War. But the new era, rather than being a time of 'universal values', will be one of growing tensions and sometimes confrontation between the forces of democracy and the forces of autocracy.⁶⁸

Again, the Chinese and Russian leaders are not *de facto* autocratic leaders; they believe in autocracy. This is hard to understand for political leaders in the West, Kagan tells us, but nevertheless true. The Chinese and Russian leaders believe in the

⁶⁷ Fukuyama, Francis, 'The End of History?', in: *The National Interest* 1989, No. 16, p. 3-18, elaborated upon in Fukuyama, Francis, 'A Reply to my Critics', in: *The National Interest* 1989, No. 18, p. 21-28 and later abandoned in Fukuyama, Francis, *After the Neocons: America at the Crossroads*, London: Profile Books 2006.

⁶⁸ Kagan 2009, p. 58.

superiority of their form of government in the same way Plato and Aristotle were averse to democracy and 'every other great thinker prior to the eighteenth century'.⁶⁹

It is on the basis of these convictions that the Russians and Chinese oppose interventions in their sovereign states because they abuse the rights of their people. The interventionist emphasis on human rights, according to the Chinese, is seen as only a new and potent strategy of global domination by 'liberal hegemonism'.⁷⁰ It is against this resurgence of autocracy that democratic states under the leadership of the United States of America try to convince the rest of the world of the superior quality of the democratic system. According to Kagan this tension between autocracy and democracy will be with us for the coming time. This emphasis on democracy as something worth defending, not only at home but also abroad, will be an important source of conflict for the coming years. This is inherent to the presuppositions of the democratic frame of mind. What are these? Kagan formulates them as follows:

Only the liberal creed grants the right - the belief that all men are created equal and have certain inalienable rights that must not be abridged by governments; that governments derive their power and legitimacy only from the consent of the governed and have a duty to protect their citizens' right to life, liberty, and property.⁷¹

Kagan underscores that to those who share this liberal faith, this commitment to democracy, it can be right to defend these principles in their foreign policies and even go to war for those principles.⁷²

We think Kagan is right. The liberal creed that animates the spirit of democracy is a universal creed. There is no sense in

⁶⁹ Kagan 2009, p. 59. Which may be a somewhat sweeping statement, although it is true that even in the nineteenth century there was widespread opposition towards the democratic idea. See on this: Lippincott, Benjamin Evans, *Victorian Critics of Democracy*, Minneapolis: The University of Minnesota Press 1938.

⁷⁰ Kagan 2009, p. 65.

⁷¹ Kagan 2009, p. 66

⁷² Kagan 2009, p. 67.

defending that only citizens in the Western world have the right to 'life, liberty, and property' or 'life, liberty, and the pursuit of happiness'. Everywhere where autocratic leaders trample upon these rights, democratic states have at least to voice protest that by doing so elementary human rights are violated. In that sense the democratic creed is universal, missionary, if you want, or – and now we come to the central concept – 'militant'.

Militant democracy as the attempt to foster democracy all over the world

For all the cynical undertones and his emphasis on description (not prescription), Kagan is not opposed to militancy when it comes to the dispersion of democratic ideas globally. He discerns three threats to the democratic tradition: China and Russia (we have seen that already), but also Islamist movements in the Middle East. They all lead the revolt against democracy. Yet, there are many tendencies that indicate the force of democracy in parts of the world where it seemed chanceless some years ago. NGO's interfere in domestic politics. There are also international organizations such as the Organization for Security and Cooperation in Europe who monitor elections. International law experts develop new concepts like 'the responsibility to protect'⁷³ and 'voluntary sovereignty waiver', which are not easy to understand merely only against the backdrop of the democratic ideal.⁷⁴ These are all universalist ideals, says Kagan: "In theory, these innovations apply to everyone. In practice, they chiefly provide democratic nations the right to intervene in the affairs of nondemocratic ideas."⁷⁵

⁷³ See on this concept: Molier, Gelijk, 'Libië als Lakmoesproef voor 'Responsibility to Protect' als internationaal rechtelijk beginsel', 2010, in: www.civismundi.nl, pp. 1-13. See further on this: Thakur, Ramesh, *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics*, Londen: Routledge, 2011.

⁷⁴ Kagan 2009, p. 64.

⁷⁵ Kagan, 2009, p. 64. See on democracy and humanitarian intervention also: Ignatieff, Michael, 'Human Rights, Sovereignty and Intervention', in: Nicholas Owen, ed., *Human Rights and Wrongs*, The Oxford Amnesty Lectures 2001, Oxford: Oxford University Press 2002, pp. 52-87; Todorov, Tzvetan,

But this 'interventionist emphasis on human rights' is heavily lambasted, as one may expect, by China, by Russia and by the Islamists in the Middle East and in other parts of the world. They get support for that protest from critics in the West who castigate 'liberal hegemonism'. According to Kagan this global competition between democratic and autocratic governments will become a dominant feature in the twenty-first-century world.⁷⁶

The defense of democracy and the attempt to foster democracies all over the world does not necessarily have to result in military interventions, of course.⁷⁷ Kagan stresses that although 'there is little sense of shared morality and common values among the great powers',⁷⁸ there is certainly consent between democratic states. It might be possible, so Kagan continues – as already briefly discussed in section 2.2 above –, to establish a global concert or league of democracies, 'perhaps informally at first'.⁷⁹ The aim of this gathering could be to hold regular meetings and consultations among democratic nations on the issues of the day. 'Such an institution could bring together Asian and Pacific nations such as Japan, Australia, and India with the EU and NATO nations of Europe and North America, along with other democracies, such as Brazil.'⁸⁰ This could signal a 'com-

'Right to Intervene or Duty to Assist?', in: Ibid., pp. 28-51; Todorov, Tzvetan, *Le Nouveau Désordre mondial: Reflexions d'un Européen*, Préface de Stanley Hoffmann, Robert Laffont, Paris 2003; Cliteur, Paul, 'Self-Defence and Terrorism', in: Arthur Eyffinger, Alan Stephens, Sam Muller, eds., *Self-Defence as a Fundamental Principle*, The Hague: Hague Academic Press 2009, pp. 67-103.

⁷⁶ Kagan 2009, p. 72.

⁷⁷ For which enthusiasm seems to be at a low ebb nowadays. See for a humorous and interesting criticism of this: Hulsman, John C., and Mitchell, A. Wess, *The Godfather Doctrine: A Foreign Policy Parable*, Princeton and Oxford: Princeton University Press 2009, contrasting favorable with John Gray's ferocious onslaught on Enlightenment principles in among others: Gray, John, *Black Mass: Apocalyptic Religion and the Death of Utopia*, London: Allen Lane, Penguin Books 2007 and Gray, John, *Gray's Anatomy: Selected Writings*, London: Allan Lane, Penguin Books 2009.

⁷⁸ Kagan 2009, p. 78.

⁷⁹ Kagan 2009, p. 97.

⁸⁰ Kagan 2009, p. 97.

mitment to the democratic idea'.⁸¹ It does not require a 'blind crusade on behalf of democracy everywhere at all times', neither does it favor 'violent confrontation with the autocratic powers' where such confrontation could be avoided, but it could mean that the world's democracies showed solidarity for one another. The democratic world should continue to promote 'political liberalization; support for human rights, including the empowerment of women; and its influence to support a free press and repeated elections that will, if nothing else, continually shift power from the few to the many'.⁸²

W.T. Stace's defense of democratic civilization

In the previous paragraphs we referred to Loewenstein, who is more of an empirical thinker than Van den Bergh, who provided us with a normative analysis of why democracy has to be 'militant'. If we try to categorize Kagan in the typology of normative/descriptive he is predominantly not a normative author. It seems fair to remark that he hardly does more than Fukuyama had done in 1989: simply observing that in the world around us some tendencies are to be distinguished. Kagan now observes, as a matter of course, that autocracies do not die out easily (as Fukuyama also had to experience soon after having published his much discussed essay, and was spelled out to him by Samuel Huntington four years after the publication of his 'End-thesis').⁸³ But neither do democracies. At the end of his essay he proclaims that the future of the international order 'will be shaped by those who have the power'.⁸⁴ In this context 'power' does not only mean economic power or military power, but also 'will'. The will to convince others of the rightness of the de-

⁸¹ Kagan 2009, p. 98.

⁸² Kagan 2009, p. 102.

⁸³ Huntington, Samuel, 'The Clash of Civilizations?', in: *Foreign Affairs* 1993, p. 22-49, elaborated upon in: Huntington, Samuel P., *The Clash of Civilizations and the Remaking of World Order*, New York: Simon & Schuster 1996.

⁸⁴ Kagan 2009, p. 105.

mocratic principles. 'The question is whether the world's democracies will again rise to that challenge'.⁸⁵

This is perfectly true. But neither Kagan, nor Fukuyama and even less Huntington are very helpful in providing legitimacy for the democratic principle. As said before, as empirical social scientists they take the world as it presents itself to us. They are not political philosophers trying to develop an argument why the non-democratic world should adopt democracy as a matter of principle, neither do they foster democratic self-confidence by explaining why democracy is superior to autocracy. Kagan has the will and ambition to defend democracy as a universal ideal, but he lacks the argumentative coherence to bring this about. Yet this seems necessary, not in the last instance because the first concept of militant democracy has to be bolstered before we can defend a second (Van den Bergh) and third (Loewenstein) dimension of militant democracy. In other words, why should we follow Van den Bergh's argument that democracy may not abolish itself by democratic means if democracy is not a universal ideal?

For a normative bolstering of the theory of militant democracy in the sense outlined, we need other authors than Fukuyama, Kagan, or Huntington. Fortunately, there are several of them. There is a multitude of competent philosophers, intellectuals and politicians who have defended the right of democracy to claim its rights as a universal mode of government, superior to autocracy and all other contenders. Especially before and during the Second World War an impressive gallery of thinkers presented itself, explaining what was at stake in the fight against Fascism, Nazism and other autocratic movements. Harold Nicolson did this in *Why Britain is at War* (1939),⁸⁶ and Harold Laski in *Reflections on the Revolution of our Time* (1943).⁸⁷ But also T.S. Eliot's plea for Christianity in *The Idea*

⁸⁵ Kagan 2009, p. 105.

⁸⁶ Nicolson, Harold, *Why Britain is at War*, with a new introduction by Andrew Roberts, London: Penguin Books 2010 (1939).

⁸⁷ Laski, Harold J., *Reflections on the Revolution of our Time*, London: George Allen & Unwin Ltd 1944.

of a Christian Society (1939) is only understandable against the backdrop of a perceived 'pagan' rise of dictatorships all over the world.⁸⁸ Also the resurgence of the idea of inalienable human rights after the Second World war is unthinkable without the expositions of the war aims by Franklin Delano Roosevelt in his *The Four Freedoms* (1941)⁸⁹ and H.G. Wells in *The Rights of Man, or What are we Fighting For?* (1940).⁹⁰ One of the most impressive manifestations of these expositions of the value of democratic civilization was, although not well known, Walter Terence Stace's *The Destiny of Western Man* (1942).⁹¹

The background of Stace's book is, of course, the Second World War, and the attack that non-democratic, totalitarian or autocratic states launched against the foundations of the democratic faith. As Stace explains in the preface to his book: the totalitarian peoples dispute the axioms of democracy. They do not admit that 'all men are created equal'. They do not agree that the individual has certain 'inalienable rights'. They do not even think that liberty is that important.⁹² They have developed a different conception of the good life than the people living in democracies, and their conception of the good life 'is rapidly incarnating itself in a new set of institutions, a new civilization'.⁹³

⁸⁸ Eliot, T.S., *The Idea of a Christian Society*, London: Faber and Faber 1939.

⁸⁹ Roosevelt, Franklin Delano, 'The Four Freedoms' (1941), in: Brian MacArthur, (ed.), *The Penguin Book of Twentieth-Century Speeches*, Harmondsworth: Penguin Books 1993, p. 197-201. See on this speech: Cliteur, Paul, 'Liberal Globalism: A Defence', in: Eva Nieuwenhuys, ed., *Neo-liberal Globalism and Social Sustainable Globalisation*, Leiden, Boston: Brill Publishers, 2006, p. 15-39.

⁹⁰ Wells, H.G., *The Rights of Man, or What are we Fighting for?*, Harmondsworth: Penguin Books 1940. See on Wells: Klug, Francesca, 'In the footsteps of H.G. Wells', in: *The New Statesman*, 9 October 2000 and Burgers, J.H., 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century', in: *Human Rights Quarterly* 1992, p. 447-477.

⁹¹ Stace, W.T., *The Destiny of Western Man*, New York: Reynal & Hitchcock 1942.

⁹² Stace 1942, p. vii.

⁹³ Stace 1942, p. vii.

Stace thinks the democratic principles can be defended against the onslaught that is being undertaken by autocratic regimes and their ideologues.⁹⁴ And he is confident such a defense is possible. This is based on his stance that some moral principles are true, others are false. He is an adherent of the view – generally discredited by relativists – that a moral principle can be true in exactly the same sense as the law of gravitation is true.⁹⁵ As in his other books, such as *The Concept of Morals* (1937)⁹⁶ and *A Critical History of Greek Philosophy* (1920),⁹⁷ Stace takes us with him on an impressive *tour d'horizon* along the western philosophical tradition discussing the Greek and Jewish origins of western civilization. And he claims that totalitarian civilization aims at quite a different way of life than democratic civilization.⁹⁸

A civilization is an ethical concept. Every civilization embodies some ethos. What we are witnessing now is a 'battle between civilizations', a 'battle between ethical ideas'.⁹⁹ And the antithesis between democratic and totalitarian civilization he sees not as a 'civil dispute between two branches of a single civilization, but as a clash of civilizations'.¹⁰⁰

There we have the idea that was taken up much later by Bernard Lewis in his important essay *The Roots of Muslim Rage* (1990)¹⁰¹ and elaborated upon by Samuel Huntington in *The Clash of Civilizations* (1993). In an detailed and consistent ar-

⁹⁴ He considers Nietzsche, with his emphasis on the Will to Power, to be the ideologue of fascism, in the same way as Socrates, Plato and Aristotle with their commitment to reason provided us the basis for democratic thought.

⁹⁵ Stace 1942, p. 17.

⁹⁶ Stace, W.T., *The Concept of Morals*, London: Macmillan 1937.

⁹⁷ Stace, W.T., *A Critical History of Greek Philosophy*, London, New York: Macmillan & Co LTD, 1960 (1920).

⁹⁸ Stace 1942., p. 57.

⁹⁹ Stace 1942, p. 81.

¹⁰⁰ Stace 1942, p. 203.

¹⁰¹ Lewis, Bernard, 'The Roots of Muslim Rage', in: *The Atlantic Monthly* 1990, also included in: *From Babel to Dragomans: Interpreting the Middle East*, London: Weidenfeld & Nicolson 2004, p. 319-331. It seems Lewis used the term 'clash of civilizations' also during a meeting in Washington in 1957, which brings us closer to Stace's use in his book in 1942.

gument, Stace tries to explain why democratic civilization is superior to totalitarian civilization.

Within the confines of this contribution we cannot do justice to Stace's subtle and intricate analysis of the nature of democracy and its counterpart, but what seems to be clear is that every attempt to defend democracy (and this is what the theoreticians of 'militant democracy' have to accomplish) is heavily dependent on a convincing argument why the democratic idea is worth defending *at all*.¹⁰²

This idea of 'militant democracy' as something to be defended is the first and perhaps primordial idea of militant democracy. Once we analyze the presuppositions of the democratic faith as described by Kagan and thoroughly analyzed by Stace, we see this is not a relativist creed, but based on a conception of the human individual as of infinite value, and in possession of certain inalienable rights. It is therefore, as Kagan remarks, that democracies cannot do anything else than 'offer support to democracy in states where democracy is at stake'.

Although this type of 'militant democracy' is at a low ebb nowadays, and many public intellectuals depict the defense of democracy as a kind of 'liberal hegemonism',¹⁰³ we have to remind ourselves that militant democracy may be indispensable as Loewenstein and Van den Bergh argue, but that their concepts of militant democracy are perhaps heavily dependent on this first concept. Why this is the case we will explain in the next paragraph.

¹⁰² Both Richard Rorty's, 'The Priority of Democracy to Philosophy', in: Richard Rorty, *Objectivism, Relativism, and Truth*, Philosophical Papers, Vol. 1, Cambridge, New York: Cambridge University Press, 1991, p. 175-197 as Hans Kelsen's 'Foundations of Democracy', in: *Ethics* 1955, Vol. LXVI No. 1, Part II, p. 1-101 fail to do this because of the inherent relativism of these accounts of the democratic idea.

¹⁰³ See e.g.: Fisk, Robert, *The Age of the Warrior: Selected Writings*, London: Fourth Estate 2008.

5.2 *The second concept: democracy resistant to its own abolition*

A second conception of militant democracy is the conception that proclaims that democracy is not held to tolerate its own abolition by democratic means in the sense of majority vote. This is the concept that Van den Bergh seems to have in view. The concept of militant democracy arose against the background that Loewenstein and Van den Berg described in their essays. Stace and Kagan write against the background of sovereign nation-states: both democratic and authoritarian or autocratic. Here the 'militancy' is enshrined in the defense that democracies pose and have to pose towards the autocratic civilization (either verbal, like Stace does, or military, like the US military forces did in the struggle against Hitler). The context of Van den Bergh and Loewenstein is different. The question here is this: democracy means respecting the decisions that are being taken by majority vote. But does democracy also imply respect for the decision that democracy has to be abolished? Can a democratic majority collectively decide that after having experimented with democracy for some time, it is not such a good idea after all? And that dictatorship is preferable? Or does the democratic creed necessitate that we take measures against the Sir Oswald Mosley's (1896-1980) of this world who try to undermine democracy from within?¹⁰⁴ As Joseph Goebbels said:

We enter the Reichstag to arm ourselves with democracy's weapons. If democracy is foolish enough to give us free railway passes and salaries, that is its problem. It does not concern us. Any way of bringing about the revolution is fine by us. (...) We are coming neither as friends or neutrals. We come as enemies! As the wolf attacks the sheep, so come we.¹⁰⁵

¹⁰⁴ Mosley is also mentioned by Loewenstein, see Loewenstein 1937a, p. 424-425.

¹⁰⁵ Goebbels, Joseph, 'Why do we want to join the Reichstag?' (translated by Randall Bytwerk), *Der Angriff* 1928. Available at: <www.calvin.edu/academic/cas/gpa/angrif06.htm>.

'Militant democracy' in its second meaning proclaims that from the nature of the democratic creed we have to be on our guard against the people who undermine democracy from within.

Democracy and suicide

The most common analogy to think about these matters seems to be 'suicide' as a decision of the human individual. It is often said that a conception of democracy that respects its own abolition is 'suicidal', which may be true, but does not settle the question. We feel inclined to prevent someone from committing suicide, but are we morally obliged to do so? And what if the person tells us he had pondered over the question of the meaning of life, *his own* life, very carefully, like Tolstoy¹⁰⁶ and Jean Amery, have done and that he, after careful consideration, comes to the conclusion that suffering and depredation are prevalent over happiness and satisfaction so he wants to terminate his own life? Should we stop him? Or should we respect his autonomy as a human being, even in the choices we ourselves do not consider necessary or even acceptable?¹⁰⁷

The analogy with suicide and the abolition of democracy by a democratic majority is far from flawless, however, because with suicide the decision is in the hands of the human individual deciding about his own destiny. It is for this reason that the German philosopher Arthur Schopenhauer rejects the taboo that the monotheist religions have cast over the decision to kill oneself. This taboo is rejectionable because 'doch offenbar jeder auf nichts in der Welt ein so unbestreitbares *Recht* hat wie auf seine eigene Person und sein Leben'.¹⁰⁸

Why would it be different with a democratic majority? The answer may be this: in the case of a democratic majority abol-

¹⁰⁶ See: Tolstoy, Leo, *A Confession and Other Religious Writings*, London: Penguin Books 1987.

¹⁰⁷ See on the philosophical aspects of suicide: Donnelly, John, ed., *Suicide: Contemporary Issues*, Prometheus Books, Buffalo, New York 1990.

¹⁰⁸ Schopenhauer, Arthur, *Parerga und Paralipomena*, Kleine Philosophische Schriften II, in: *Sämtliche Werke*, Band V, Frankfurt am Main: Cotta-Verlag/Insel-Verlag 1965 (1851), p. 361.

ishing democracy it is a decision by a majority overriding the interests of a minority. Besides, it is the decision of the present generation trampling on the rights of future generations. For that very reason most democracies have considered it advisable to entrench certain constitutional provisions by making them more difficult to change. Constitutions which incorporate such provisions are called 'rigid constitutions'. The notion of a rigid constitution is a constitutional device to make it more resistant towards the fickle temper of democratic majorities.¹⁰⁹

The notion of a 'rigid constitution' as commonly interpreted does not mean that the constitutional clauses are *completely* unchangeable. It only means that for changing the constitution one needs a qualified majority of two third of the votes in both chambers of parliament. Nevertheless, we may pose the question whether some clauses of the constitution are so important to the foundations of democracy that we should make them completely unassailable. That would be the case with e.g. the clauses of the constitution on which the democratic character of the form of government hinges. Let us therefore direct our attention to the Dutch constitution, particularly to those parts that deal with democracy.

Clauses about democracy in the Dutch constitution

But first a note of caution. Legend has it that Napoleon said: 'A constitution should be short and obscure'.¹¹⁰ The Dutch constitution is not particularly short, but obscure it certainly is. The Dutch constitution has no preamble explaining the foundations of the organization of the state and its basic provisions can only be understood against the background of a thorough knowledge of Dutch constitutional history.¹¹¹ Nevertheless, against the

¹⁰⁹ See on the notion of rigid and flexible constitutions: Bryce, James, 'Flexible and rigid constitutions', in: *Studies in history and jurisprudence*, Volume I, Aalen: Scientia Verlag Aalen 1980 (1901), p. 145-252.

¹¹⁰ Cited in: Schwöbel, Christine E.J., *Global Constitutionalism in International Legal Perspective*, Leiden, Boston: Martinus Nijhoff Publishers 2011, p. 11.

¹¹¹ On this: Cliteur, P.B. and Voermans, W.J.M., *Preambles*, Alphen aan en Rijn: Kluwer 2009.

background of an understanding of the basic principles of constitutional democracy, it is possible to highlight some clauses of the constitution as essential for the maintenance of the democratic character of the Dutch polity. Let us analyze some examples.

Art. 42.1 runs: 'The Government shall comprise the King and the Ministers' ('De regering wordt gevormd door de Koning en de ministers').

Art. 42.2 runs: 'The Ministers, and not the King, shall be responsible for acts of government' ('De Koning is onschendbaar; de ministers zijn verantwoordelijk').

Art. 50 runs: 'The States General shall represent the entire people of the Netherlands' ('De Staten-Generaal vertegenwoordigen het gehele Nederlandse volk').

Art. 54 runs: 'The members of the Lower House shall be elected directly by Dutch nationals who have attained the age of eighteen' ('De leden van de Tweede Kamer worden rechtstreeks gekozen door de Nederlanders die de leeftijd van achttien jaar hebben bereikt').

Art. 81 states: 'Acts of Parliament shall be enacted jointly by the Government and the States General' ('De vaststelling van de wetten geschiedt door de regering en de Staten-Generaal gezamenlijk').

What these clauses have in common is that they express the democratic character of the Dutch polity. Like in all constitutional monarchies the constitution contains some things that are not essential for the democratic character of the state, and in fact senseless when taken literally. That is the case with the central position of the King in the written constitution. This is not in accordance with the actual functioning of present day democracies. What Phillip Allott writes about the position of the British Queen is also true of the Dutch Queen. Allott writes: 'The British people as they constitute the society which constitutes them as a people, communicate with themselves in a familiar fog of half-formed ideas and a half-forgotten past.'¹¹² Part

¹¹² Allott, Philip, 'The Theory of the British Constitution', in: Hyman Gross and Ross Harrison, eds., *Jurisprudence*. Cambridge Essays, Oxford: Clarendon

of that 'fog' is that the British Constitution is articulated around the fantasy of an absolute monarchy. It is 'a fantasy of palaces and glass coaches and orders of chivalry, a fantasy in which the representatives of the people present Humble Addresses to Her Majesty, and statements of government policy are published By Command of Her Majesty, in which the monarch reads the government's programme for the parliamentary session seated upon a gilded throne, in the presence of tiaraed duchesses and earls in ermine overheard by the representatives of the people who remain standing.'¹¹³ This fantasy also entails that legislation becomes law when the monarch assents. The British constitution, Allott says, 'rests upon a fantasy which is, and is known to be, a lie.'¹¹⁴

The same is true of the Dutch constitution. Read out of context and without knowledge of the Dutch constitutional history, art. 42.2 would give the impression that the King is a very important figure. But that fantasy evaporates once we realize that where the *responsibility* lies, also the *power* is vested. So the ministers are ultimately in charge. *They* make the decisions that direct the state. Those ministers are accountable to Parliament, the representatives of the people. And the ministers cannot stay in power against the will of Parliament (States General). That makes the Netherlands 'a democracy'.¹¹⁵

One of the most important actions the state can undertake is making laws, binding upon the whole population. These laws are made by the Government, together with the States General, as art. 81 reveals. So the laws are an expression of the will of the people. That too makes the Netherlands a democracy.

Now let us address the problems that Van den Berg and Loewenstein pondered over. Suppose a parliamentary majority decides to abolish democracy, *i.e.* the ministers would be sent

home and eliminated from the Dutch constitution, the States General would be changed in a kind of advisory council (not binding) and the King would, again, take full control.¹¹⁶ According to some conceptions of democracy that would nonetheless be 'democratic' when it happens by majority vote (Kelsen).¹¹⁷ But Van den Berg does not think so. The adherents of the concept of militant democracy in the second meaning of the term, like Van den Bergh, contest this interpretation of the idea of democracy. Democracy means majority vote. But there is one expression of the democratic will that can never be accepted: the decision to abolish the democratic system altogether. So even in a peaceful way and in accordance with the rules of democratic procedure democracy cannot eliminate itself. A democratic decision to change the structure of the state in an autocracy will not be accepted as 'democratic'.

Is advocating the abolition of democracy allowed?

Now that brings us to the question: when is that danger looming? And with this question we have the linchpin between the second concept of militant democracy and the third concept. The parliamentary majority to abolish democracy does not like manna, *i.e.* suddenly, fall from heaven (Exodus 16:12-16). Anti-democratic parties have a history. They prepare themselves for the final takeover, as is described so well by Loewenstein and other authors.¹¹⁸ They use civil liberties to eviscerate democracy from within. They use freedom of speech, freedom of religion, the freedom of assembly and other freedoms to plot for the final takeover. And again the question arises: when to intervene? Is it allowed to prohibit anti-democratic parties to make propaganda for their cause? Should we allow it to disperse anti-democratic views? Should we, returning to Kagan's essay, allow the followers of Putin, the Chinese autocrats and the Islamists to ad-

don Press 1992, pp. 173-205, p. 188.

¹¹³ Allott 1992, p. 188.

¹¹⁴ Allott 1992, p. 188.

¹¹⁵ See on this: Cliteur, Paul, 'Indien verantwoordelijk dan bevoegd?', in: M.C. Burkens, E.C.M. Jurgens, A.K. Koekkoek, J.J. Vis, red., *Gelet op de Grondwet*, Den Haag: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties 1998, p. 124-137.

¹¹⁶ Or some man on horseback, see what Kagan writes about Putin.

¹¹⁷ This is most explicitly stated by Kelsen in his essay 'Verteidigung der Demokratie', see: Kelsen 2006, p. 237. See also section 3.2 above.

¹¹⁸ E.g. Haffner, Sebastian, *Defying Hitler: A Memoir*, London: Weidenfeld & Nicolson 2002.

vertise their views in books and articles within Western democracies? Or should that material, poisoning the souls of men, be forbidden?

Usually democratic states are reluctant to forbid anti-democratic ideas to circulate in written form. The reason is clear. If they would do this, they would resemble the authoritarian states which they do not want to be. So no censorship. No list of forbidden books. That would, after all, imply that not only *The Lenin Anthology*¹¹⁹ could not be published, but also Plato's *Republic*¹²⁰ or Machiavelli's *The Prince*¹²¹ would end up on an Index of Forbidden Books. Democracy has confidence in the free exchange of ideas.¹²²

But yet: not without limits. If there is a 'clear and present danger' (this is the formula usually entertained in American case law) that anti-democratic propaganda might be so successful that actual democracies are turned into dictatorships the democratic state claims the right to intervene.

That clear and present danger- criterion was developed by the US Supreme Court in *Brandenburg v. Ohio* (1969). This was a case about Clarence Brandenburg, a member of the Ku-Klux-Klan, who was prosecuted for incitement to violence and participating in a criminal organization. In that case the US Supreme Court ruled that a limitation of free speech is only permissible under the First Amendment of the US Constitution if it can be proven that there was a 'clear and present danger' that harm would be inflicted.¹²³ During the Cold War this 'clear and present danger' was also used as the formula to judge whether

¹¹⁹ Lenin, *The Lenin Anthology*, Selected, edited and introduced by Robert C. Tucker, New York: W.W. Norton & Company, Inc. 1975.

¹²⁰ Plato, *Complete Works*, Edited, with Introduction and Notes, by John M. Cooper, Indianapolis/Cambridge: Hackett Publishing Company, 1997.

¹²¹ Machiavelli, Niccolò, *The Prince*, Translated and edited by Robert M. Adams, New York: W.W. Norton & Company 1977 (1532).

¹²² As advocated by Mill in: Mill, J.S., *On Liberty*, Harmondsworth: Penguin Book 1977 (1859).

¹²³ See on this case: Guiora, Amos, 'Vrijheid van meningsuiting: een terugblik en een blik vooruit', in: Afshin Ellian, Geliijn Molier, Tom Zwart, red., *Mag ik dit zeggen? Beschouwingen over de vrijheid van meningsuiting*, Den Haag: Boom Juridische Uitgevers 2011, p. 117-139, p. 164.

groups posed a danger to the American state because they favored communism over liberal democracy.

Examples of a clear and present danger that democracy will crumble: Refah Partisi

Let us return to the three challenges that Kagan discerned for democracies at present and for the time to come: Russia's autocracy, China's autocracy, Islamist groups in the Middle East. During the cold war American case law was very much concerned with communism (Russia and China, so to say). Civil liberties like free speech could be curtailed when there was a clear and present danger that communist propaganda would undermine the democratic state to such a degree that grave consequences would be imminent if the government would hesitate to intervene. At the present time China and Russia do not present problems to Western democracies in the sense that their propaganda is likely to put a challenge to the democratic system from within. That is to say: the Trotskyist, Maoist, Sartrean, Foucaultian and otherwise anti-western influences that were so popular in the nineteen-sixties of the twentieth century at the moment do not pose a 'clear and present danger' that democracies will be toppled where they exist.¹²⁴ The threat from Russia and China comes from without. The problems they pose is that they are superpowers, having oil reserves, military equipment and they seem able to quell internal protest and demands for democracy.

This is not the case with the third challenge that Kagan delineated for Western democracies: Islamism. Islamism is a potent force in countries like Egypt, Sudan, Somalia, Turkey, and, according to some more pessimistic voices, also the West. It is not our aim to give a realistic assessment of the dangers of Islamism, but what we can do is analyze in what sense Islamism contradicts the principles of liberal democracy and what this has to do with the second concept of liberal democracy.

¹²⁴ An interesting analysis presents: Scruton, Roger, *Thinkers of the New Left*, Longman, Burnt Mill 1985.

An important case in this respect is a case ruled by the European Court of Human Rights in Strasbourg about a Turkish Islamist Party, the Refah Party, aiming to introduce sharia law in Turkey.

In an epochal verdict on the Turkish Refah Party it judged sharia-law to be incompatible with European ideas on democracy.¹²⁵ The reason is simple: sharia law is the law 'from God'. According to the believers in this type of law it is not made by humans, but by God himself. Sharia law basically favors the idea of governance by God in the sense of theocracy. And theocracy is from the nature of the concept irreconcilable with democracy (governance by human individuals). Even if this literal antithesis of democracy and theocracy can be mitigated, theocracy (or the rule of sharia law) still implies that clerics as interpreters of the supposed law of God get a position in the governance of the state that is hardly supportive of democratic ideas and institutions. So advocating sharia law – even if restricted to family matters and excluding penal procedure, as is usually proposed to quell concern over the gradual introduction of religious jurisdiction in democratic states – is always something that is difficult to harmonize with democracy. Militant democracy in this interpretation means: we have to protect democracy from all pretensions of religious believers, or rather fanatics, that there are better and more reliable sources of the law than human arbitration.

This case also has relevance for the Dutch situation. If there were a party in the Netherlands aiming to introduce Mosaic law or sharia law this would violate art. 81 of the Dutch constitution, which states (as we have seen) that the laws are made by Government and the States General.¹²⁶ As Stace would explain

¹²⁵ ECHR, 'Refah Partisi (The Welfare Party) v. Turkey', 13 February 2003.

¹²⁶ In this respect the Dutch 'Staatkundig Gereformeerde Partij' (SGP) is a case in point. This fundamentalist Christian party holds three seats in parliament (as of 2012) and this has been stable through the years (or even: decennia); fluctuating between two and three seats. The party's 'Program van Beginselen' ('The Core Principles') explicitly denounces quite a few fundamental (democratic) values enshrined in the Dutch constitution, like freedom of speech, equal rights for men and women, the abolition of the death penalty,

in his in-depth analysis of the foundations of democracy: that is not a simple observation, but expresses the essence of democracy. Democracy means that the citizen in making laws for himself expresses his autonomy. If there were a party advocating the introduction of 'holy law' (again, whether this is the Mosaic law from the Old Testament or sharia law from the Koran is irrelevant) this would violate the foundations of democracy. Democracy is, after all, democracy (government by the people).

5.3 *The third concept: civil rights protected*

So far we have focused on the second conception of militant democracy. The first conception of militant democracy focused on defending democracy as a preferential type of government in general. The second concept of militant democracy denies that democrats have to accept 'democratic suicide', i.e. the decision to abolish democracy, as a consequence of the democratic creed.

This last concept of militant democracy, however, is judged as too limited by some. Critics of the second concept of militant democracy consider this 'too formal' or 'merely formalistic'. They want a more 'substantial' or 'material' defense of democracy.

At the bottom of this dispute about the meaning of the concept of militant democracy is, of course, a dispute about democracy as such. Ellian, Molier en Zwart distinguish a formal or procedural conception of democracy from a 'material' or 'substantial' concept of democracy.¹²⁷

This *third* concept of militant democracy is based on the idea that the notion of 'democracy' is broader than only referring to majority vote ('Kopfzahl-demokratie', as the Germans say). So

and – on top of that – it advocates the introduction of law solely based on the 'Word of God'. A major difference with Refah Partisi is, of course, the SGP's steady but small electoral power. The 'Program van Beginselen' (including explanatory notes, in Dutch) is available at:

<<http://www.sgp.nl/Media/download/5257/Toelichting%20Pr.v.B.pdf>>

¹²⁷ Ellian, Afshin, Molier, Gelijn, Zwart, Tom, 'Inleiding', in: Afshin Ellian, Gelijn, Molier, Tom Zwart 2011, pp. 7-17, pp. 16 and 17.

that focus on procedures and voting, that we have analyzed before, although important, is not enough for a democracy. Democracy is based in a broader framework of ideas and institutions. Democracy is also based on respect for certain elementary constitutional rights, such as free speech, assembly, and press. This is the concept Loewenstein comments on when he writes (as cited before): 'Democracy stands for fundamental rights, for fair play for all opinions, for free speech, assembly, press. How could it address itself to curtailing these without destroying the very basis of its existence and justification?'. This goes much further than the articles from the Dutch constitution that we have quoted before. Not only the clauses of the constitution that have to do with elections, ministerial responsibility, the submissiveness of the Crown and civil servants to the democratically legitimated state powers should be protected, but also a minimum of civil liberties without which a proper functioning of democracy is impossible. We should be on our guard against parties and individuals likely to change the formal democratic character of the Dutch constitution, but also parties and individuals that sometimes bluntly announce they will abolish freedom of speech, freedom of religion and freedom of assembly once they are in power, as Goebbels so openly stated.¹²⁸

This last concept of militant democracy opens a wide variety of questions about *what* constitutional rights, and *how far*, may be infringed without violating the idea of democracy as such. Again, we give an example of an Islamist assault on elementary civil liberties, this time not in Turkey but in the capital of Great Britain.

The controversy over Terence McNally's play Corpus Christi

The question whether propaganda for the radical Islamist conception of governance should be protected under the clause of free speech is not only topical in the Middle East, but also in Western democracies. In 1999 a group of radical Muslims, the

¹²⁸ A similar stance is taken by Gelijs Molier in Molier, G., 'De vrijheid van meningsuiting: 'it's politics all the way down'', in: Afshin Ellian, Gelijs Molier, Tom Zwart 2011, p. 205-242, p. 236-242.

Al-Muhajiroun, issued a death verdict against the American playwright Terence McNally, whose play *Corpus Christi*,¹²⁹ was about to be performed in London. The leader of this group, Sheik Omar Bakri Muhammad, fumed against McNally's play as being 'blasphemous'. Explaining what his stance was towards democratic civil liberties, the radical leader made clear that his organization would not rest till the black flag of Islam would be officially adopted in Downing Street.¹³⁰ As Melanie Phillips has made clear in her book *Londonistan: How Britain is Creating a Terror State Within* (2006)¹³¹ people like Sheik Bakri Muhammad really mean what they say. Their aim is nothing less than a regime change. They advocate the substitution of the liberal democratic character of the British political order into a kind of sharia-state.

This subject is, among others, treated by the American scholar Amos Guiora in his book *Freedom from Religion: Rights and National Security* (2009)¹³² and in his contribution to the volume on freedom of speech by Ellian, Molier and Zwart.¹³³ In American case law this question is treated within the context of a 'clear and present danger' that extremist speech can pose to the continuation of the democratic state itself. There is freedom of speech and also freedom of *religious* speech, of course. But what if a radical preacher inveighs against democracy and

¹²⁹ McNally, Terrence, *Corpus Christi*, New York: Dramatists Play Service Inc. 1999.

¹³⁰ See on this case: Cliteur, P.B., Ellian, A., *Encyclopedie van de rechtswetenschap*, I, De grondslagen, Deventer: Kluwer 2011, p. 63.

¹³¹ Phillips, Melanie, *Londonistan: How Britain is Creating a Terror State Within*, London: Gibson Square 2006. See also: Phillips, Melanie, *The World Turned Upside Down: The Global Battle over God, Truth, and Power*, New York and London: Encounter Books 2010.

¹³² Guiora, Amos N., *Freedom From Religion: Rights and National Security*, Terrorism and Global Justice Series, Oxford: Oxford University Press 2009.

¹³³ Guiora, Amos, 'Vrijheid van meningsuiting: een terugblik en een blik vooruit', in: Afshin Ellian, Gelijs Molier, Tom Zwart 2011, p. 117-139. See also: Guiora, Amos, 'Multiculturalism and Religious Extremism: Whose Human Rights Do We Protect?', in: Gelijs Molier, Afshin Ellian, and David Suurland, eds., *Terrorism, Ideology, Law, and Policy*, Dordrecht: Republic of Letters Publishing 2011, p. 337-361.

seems to be so successful that the abolition of democracy and the introduction of some kind of theocracy seems a likely perspective? Can democracy condone that?

This question is far from academic, as we know from the turmoil in the Middle-East and discussions about the 'Arab Spring'. One of the problems with the Muslim Brotherhood is that nowadays they do not always resort to violence.¹³⁴ Some commentators see the Muslim Brothers for that reason as reliable partners in a new democratic process. Others, however, warn us that the Muslim Brothers are still heavily opposed to the system of democracy as such. They like to substitute this for a kind of Islamist theocracy, but they only wait for the most suitable opportunity to realize their aims without bloodshed. Within the category of 'Islamism' the German Islam scholar and professor of international relations Bassam Tibi discerns two strands.¹³⁵ On the one hand there are the Islamists who are prepared to use violence. These are the 'jihadists'. On the other hand there are the Islamists he calls 'institutional Islamists', those who forgo violence but try to gain power by institutional means. We have to understand that these two groups have a difference of opinion about the *means* to be employed, not about the *goal* itself: the final abolition of liberal democracy. Jihadists and institutional Islamists are in complete unison about the final goal of their efforts.

Most western political commentators reject this apprehension as being exaggerated and unduly alarmist. They tend to see people like Bakri Muhammad as nuisances or as crooks, but not as serious threats to the security, let alone survival of the British

¹³⁴ See on the Muslim Brotherhood: Ternisien, Xavier, *Les Frères musulmans*, Nouvelle Édition, Paris: Arthème Fayard 2011 (2005); Ulfkotte, Udo, *Heiliger Krieg in Europa: Wie die Radikale Muslimbruderschaft unsere Gesellschaft bedroht*, Vorwort von Bassam Tibi, Frankfurt am Main: Eichborn 2007; Berman, Paul, *The Flight of the Intellectuals*, Brooklyn, New York: Melville House, 2010.

¹³⁵ In among others: Tibi, Bassam, *Political Islam, World Politics and Europe: Democratic Peace and Euro-Islam versus Global Jihad*, London and New York: Routledge, 2008; Tibi, Bassam, *Euro-Islam: Die Lösung eines Zivilisationskonfliktes*, Darmstadt: Primus Verlag, 2009.

state.¹³⁶ Or they think Islamists pose a threat to countries like Tunisia, Egypt and Turkey, but not to Western states where the democratic traditions are so strong that we do not have to worry about their collapse.

This attitude is usually reinforced because those who do not pay attention to hate preachers from the Middle East are at the same time very concerned about populist leaders within their midst. Not the Islamist preachers advocating sharia law, threatening Western play writers and fulminating against free speech and freedom of religion are the real threat to contemporary liberal democracies but the populist leaders sprouting hatred towards ethnic and religious minorities. It is not Abu Hamza and Mohammed Bakri we should focus on but Marie Le Pen,¹³⁷ Pim Fortuyn¹³⁸ and Geert Wilders.¹³⁹ Does not incitement to hatred, discrimination and physical violence form the real problem at the moment (to quote 137d from the Dutch Penal Code)?

The populist parties reproach the progressive-liberal elite that it does not identify the real threats and challenges in the contemporary world.¹⁴⁰ The liberal elite, like the elite in Weimar, has lost contact with reality. By not heeding the dangers that are so prevalent they undermine the democratic system. The 'real and present danger' is an intellectual elite that has lost track with reality. They think democracy has to be protected against the undermining influence of populist political leaders¹⁴¹ while

¹³⁶ O'Neill, Sean, and McGrory, Daniel, *The Suicide Factory: Abu Hamza and the Finsbury Park Mosque*, London, New York, Toronto and Sydney: Harper Perennial 2006.

¹³⁷ Fourest, Caroline, & Venner, Fiametta, *Marine Le Pen*, Paris: Grasset 2011.

¹³⁸ Couwenberg, S.W., *Opstand der burgers: De Fortuyn-revolte en het demasqué van de oude politiek*, Budel: Damon 2004.

¹³⁹ Fennema, Meindert, *Geert Wilders: Tvenaarsleerling*, Amsterdam: Uitgeverij Bert Bakker 2010.

¹⁴⁰ See e.g.: Wilders, Geert, 'Defending the West from Cultural Relativism and Jihad', Annual Lecture of the Magna Carta Foundation in Rome, March 25, 2011, in: *American Thinker*, 26 March 2011 and Bosma, Martin, *De schijn-elite van de valsemunters*, Amsterdam: Prometheus 2011.

¹⁴¹ See for an interesting overview of populist movements: Taguieff, Pierre-André, *L'illusion populiste: essai sur les démagogies de l'âge démocratique*,

oblivious or deliberately neglecting that it is those populist leaders who sense where the real threats come from.

There may be an element of truth in this. It is, for instance, correct that the populist leaders do not advocate the abolition of democracy as people like Abu Hamza, Sheik Mohammed Bakri and others do. What they usually do is to advocate the abolition of all restraints in criticizing the culture and religion of religious minorities. Here the Dutch Freedom Party (PVV) is a case point. The leader of this party, Geert Wilders, was acquitted of all charges of insulting religious minorities and incitement to hatred against Muslims on June 23, 2011.¹⁴² Yet there is a tendency to consider parties as the PVV as 'undemocratic parties' that undermine the proper functioning of democracy. The idea behind this accusation is that criticism of the religion of religious minorities (in particular Muslims) is an unjustified criticism of the culture or religion of these people and therefore stigmatizing or insulting. It may not be 'racism' in the literal sense of the word, but 'postmodern', 'poststructuralist', 'anti-colonialist' thinkers sense what they call 'cultural racism'.¹⁴³

This again has repercussions for the discussion about 'militant democracy'. While people like Wilders will claim to defend traditional parliamentary democracy against the gradual undermining influence of jihadist radicals, its political opponents claim that the PVV violates the rights of religious minorities (especially the right not to be discriminated against). Both par-

ties claim 'militant democracy' as the concept that inspires their actions.

There are no signs this discussion will abate in the foreseeable future. The political debate is highly polarized. Quality newspapers, in the Netherlands, such as the *NRC Handelsblad* are no longer considered to be independent neutral providers of the news, but part of the culture wars, trying with all possible means to portray the populist leaders in the bleakest colors. Former editor Hans Moll wrote a book on the anti-western, anti-Israeli and pro-Islam attitudes of *NRC Handelsblad*.¹⁴⁴ This apparent bias of present day journalism is nothing specifically Dutch, of course. Ronald Dworkin wrote about the polarized political debate in The United States of America¹⁴⁵ and Bruce Bawer identifies the same tendencies in British and American newspapers as Moll did in the Dutch media landscape.¹⁴⁶ There are not many intellectuals who, like the French journalists Caroline Fourest and Fiametta Venner, consistently analyze and criticize all antimodernist and anti-liberal assaults, whether they come from Islamist preachers like Tariq Ramadan¹⁴⁷ or from populist politicians like Marie Le Pen.¹⁴⁸

Amid all this controversy however there is one conviction all parties share, viz. that liberal democracy can only survive if we are on our guard against the forces that undermine it. If liberal

Paris: Flammarion, 2007.

¹⁴² Rechtbank Amsterdam, 23 juni 2011 (vrijspraak Wilders, LJN BQ9001). See for some comments on the trial: Baudet, Thierry, 'Thou Shalt Not Offend Islam: A firsthand account of the Dutch trial of Geert Wilders', in: *The City Journal*, 19 January 2010; Baudet, Thierry, 'De vrijspraak van Wilders in Europa', in: *Trouw*, 25 juni 2011; Esman, Abigail, 'Geert Wilders Found 'Not Guilty' in Victory For Free Speech', in: *Forbes.com*, 23 June 2011.

¹⁴³ See on these movements: Gellner, Ernest, *Postmodernism, Reason, and Religion*, London and New York: Routledge 1992 and Sokal, Alan & Bricmont, Jean, *Impostures Intellectuelles*, Ed. Paris: Odile Jacob 1997. For the political ramifications: Wolin, Richard, *The Wind from the East: French Intellectuals, the Cultural Revolution, and the Legacy of the 1960's*, Princeton & Oxford: Princeton University Press 2010.

¹⁴⁴ Moll, Hans, *Hoe de nuance verdween uit een kwaliteitskrant: NRC Handelsblad neemt stelling tegen Israël*, Amsterdam: Uitgeverij Bert Bakker 2011. The book aroused quite a stir resulting in an official commentary by the editor in chief of *NRC Handelsblad* (denying the accusations) and the publication of a book review by an independent (external) reviewer in the newspaper's weekly book supplement.

¹⁴⁵ Dworkin, Ronald, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton and Oxford: Princeton University Press 2006.

¹⁴⁶ Bawer, Bruce, 'The Low Countries at Their Lowest', in: *FrontPage Magazine*, December 2, 2011.

¹⁴⁷ Fourest, Caroline, *Frère Tariq: Discours, stratégie et méthode de Tariq Ramadan*, Paris: Bernard Grasset 2004, translated as: *Brother Tariq: The Doublespeak of Tariq Ramadan*, New York and London: Encounter Books 2008.

¹⁴⁸ Fourest, Caroline, & Venner, Fiametta, *Marine Le Pen*, Paris: Grasset 2011.

democracy is to survive we need *militant* democracy. That means that the concept of militant democracy as developed by the German constitutional scholar Karl Loewenstein and the Dutch professor of constitutional law George van den Bergh is likely to stay pivotal for the years to come. *Which* of the three concepts of militant democracy we have discerned here will prove to be the most prominent therein, remains to be seen.